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IN THE

Supreme Court of the United States

October Term, 1968
No. 855

GEORGE ULLMAN and JOE SIMON,

Petitioners,

vs.

KYLE Z. GRAINGER, JR.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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GEORGE ULLMAN and JOE SIMON,

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KYLE Z. GRAINGER, JR.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on June 18, 1968.

Citations to Opinions Below.

The Orders of the District Court filed April 26, 1967, May 22, 1967, and August 3, 1967, from which consolidated appeals were taken in this cause, and the opinion of the court below filed on June 18, 1968, are not reported, either officially or unofficially, and for convenience are appended to this petition as Appendix I.

A copy of the judgment of the court below is appended to this petition as Appendix II.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on June 18, 1968 (App. II, *infra*). Rehearing was denied on October 9, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented.

I.

Whether the Bankruptcy Court acted in excess of its jurisdiction, and thereby denied Petitioners due process of law, when it vacated its final order of sale to Petitioners, ex parte and without notice to Petitioners, after the sale to Petitioners had been approved and confirmed by the Court.

II.

Whether or not the fundamental principles of law enunciated by the Supreme Court of the United States in the two cases of *Halliday v. Stuart*, 151 U.S. 299, 38 L. Ed. 141, 14 S. Ct. 302, and *Blossom v. Milwaukee & C. R. Co.*, (U.S.) 1 Wall 655, 17 L. Ed. 673, is still the law today, and therefore should have been followed by the Court below under the policy of *Stare Decisis*.

III.

Whether Petitioners were incorrectly characterized by the Circuit Court as receiving a mere contract right or whether Petitioners were actually purchasers under a judicial sale held in the Bankruptcy Court after due notice, advertising, a public hearing thereon, open bidding, and a confirmatory final Court order which gave them vested legal rights.

Constitutional and Statutory Provisions Applicable to This Case.

CONSTITUTION, FIFTH AMENDMENT:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actua service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life of limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

BANKRUPTCY ACT, SECTION 116(3) (11 U.S.C. SECTION 516):

Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court—

> (3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve;

Statement of the Case.

The Debtor Corporation filed the instant proceedings for the reorganization of a corporation and its subsidiaries under Chapter X of the Bankruptcy Act on January 31, 1964 [C. T. p. 2]. The jurisdiction of the District Court was invoked because the case arises under the Bankruptcy Act. The decision in the court

below involved three consolidated appeals which were consolidated by Stipulation and Court Order thereon [C. T. pp. 199-201]. All the appeals involve the same real property and the same issue relating to the sale thereof by the Reorganization Trustee [C. T. p. 200, lines 16-18].

The subject real property was encumbered by a purchase money First Trust Deed upon which a default was recorded sometime in 1966. No restraining order against a foreclosure sale was issued by the Bankruptcy Court. A Trustee's Foreclosure Sale was advertised for January 19, 1967, at 11:00 o'clock A.M. at the request of the beneficiary, Scottish Rite Cathedral Association [C. T. p. 53, line 25, to p. 55, line 21].

The Scottish Rite Cathedral Association agreed that if the Bankruptcy Court confirmed the sale of the subject real property before 11:00 o'clock A.M. on January 19, 1967, the Foreclosure Sale would be continued in order to permit the Court sale to go through escrow.

The Reorganization Trustee, pursuant to Court Order [C. T. p. 18, lines 19-30], advertised a sale of the subject real property to be held in the Courtroom on January 11, 1967. No offers were made at that time and the sale was continued by the Court to January 19, 1967 at 10:00 o'clock A.M. [C. T. p. 18, lines 30-32].

On January 18, 1967, an unconditional written offer to purchase the subject real property was made by Petitioners and accepted by the Reorganization Trustee [C. T. pp. 66-67], subject only to approval by the Bankruptcy Court. On January 19, 1967, at the continued public hearing on the sale, the Bankruptcy Court orally

approved the unconditional written offer of Petitioners and accepted their cash down payment of $27,500.00, representing 10% of the purchase price of $275,000.00 [C. T. pp. 18-20]. The Foreclosure Sale of the subject real property was voluntarily continued by the beneficiary, Scottish Rite Cathedral Association, in order to permit the Reorganization Trustee to close escrow with Petitioners. Significantly, on the date the subject real property would have been sold under a Trustee's Foreclosure Sale but for Petitioner's written unconditional offer to buy, no other offers to buy the subject real property were made or tendered by any other party.

By Court Order filed February 10, 1967, and entered February 14, 1967, the Bankruptcy Court confirmed and approved the sale of the subject real property to Petitioners [C. T. pp. 18-22]. An escrow was opened on February 3, 1967, and the escrow instructions thereto were made part of the Court Order filed February 10, 1967. These escrow instructions contained the following clause:

> "Seller believes that the only lease on the subject property in effect at the present time is a lease between seller's predecessor in title and the Parking Lot Operator, and that said lease contains a cancellation provision providing that any new purchase of said property may cancel said lease upon 30 days written notice. The offer to purchase subject property conditioned upon a 30 day cancellation clause in said Parking Operator's Lease." [C. T. p. 22].

On February 10, 1967, additional escrow instructions were executed by the parties. These additional es-

crow instructions were not incorporated into the Court Order of Sale filed February 10, 1967, and they contained the following clause not contained in the February 33, 1967, escrow instructions and not incorporated into any Court Order of Sale:

> "(3) . . . . Seller shall have the right to abandon this escrow if he determines that he cannot deliver possession of the parking lot within a reasonable period of time to buyer." [C. T. p. 35].

The lease referred to in the escrow instructions dated February 33, 1967, was a lease given to Charter Auto Parks, a parking lot operator. Charter Auto Parks was in possession of the subject real property and the lease under which it held possession did not contain a thirty day cancellation clause.

On March 23, 1967, the attorney for the Reorganization Trustee wrote a letter to the attorney for Petitioners advising in part as follows:

> "Under the existing circumstances and in view of the apparent intent of Charter Auto Parks to litigate the matter, the Trustee now advises you on behalf of the buyers (George Ullman and Joe Simon) that it appears unlikely that possession of the parking lot can be delivered within a reasonable period of time and, accordingly, it now appears that the Trustee will be required to refund the deposit of $27,500. Please advise me on or before 5:00 o'clock P.M., March 30, 1967, whether the buyers will accept the property subject to whatever rights have been created in Charter Auto Parks or their successors by reason of the lease of January 20, 1966." [C. T. pp. 109-110].

On April 13, 1967, the attorney for Petitioners replied to said letter advising the attorney for the Reorganization Trustee as follows:

> "Under the circumstances, it occurs to me that arrangements can be made between us that (1) the escrow closes and the title be delivered to Ullman and Simon, and (2) that you proceed with your action to obtain possession of the parking lot in a diligent manner and I will do everything in my power to assist in said litigation." [C. T. pp. 116-117].

On April 26, 1967, the Reorganization Trustee made application with the Bankruptcy Court, ex parte and without notice to Petitioners, for an order vacating the confirmed order of sale of the subject real property to Petitioners, and for an order prescribing notice of a hearing to consider further offers of sale of the subject real property [C. T. pp. 27-32]. On the same day, April 26, 1968, an ex parte order to that effect was filed without a hearing thereon, and without notice to Petitioners, the interested parties therein [C. T. pp. 23-25].

Attached as Exhibit "B" to the Reorganization Trustee's ex parte application for an order vacating the confirmed Order of Sale filed February 10, 1967, were escrow instructions entered into between the Reorganization Trustee and Morris M. Greenstein on April 24, 1967, without prior to subsequent Court Order, while the escrow with Petitioners was still pending, while the Reorganization Trustee still retained Petitioners' deposit of $27,500.00, and before the Reorganization Trustee had applied to the Bankruptcy Court for an

order vacating the Court Order of sale of the subject real property to Petitioners [C. T. pp. 38-40].

On Friday, April 28, 1967, the attorney for Petitioners received notice of the Order of April 26, 1967, cancelling the sale to Petitioners, along with notice that the same real property was to be put up for further offers on the following Monday, May 1, 1967, at 1:30 o'clock P.M. [Exs; C. T. pp. 118-123; C. T. pp. 23-24].

Petitioners and their attorney were present in Court at the aforesaid hearing on May 1, 1967, and objected to the jurisdiction of the Court to proceed with the new sale of the subject real property [R. T. May 1, 1967, p. 8, line 25, to p. 16, line 10] and raised the Constitutional Question of violation of Due Process of Law.

On May 4, 1967, an order confirming and approving the sale of the subject real property to Joe's Auto Parks, a co-partnership, was filed [C. T. pp. 42-45].

On May 5, 1967, Petitioners filed an application with the Court for an Order to Show Cause why the Order of April 26, 1967, should not be vacated and the previous Order filed February 10, 1967, confirming and approving the sale of the subject real property to Petitioners, should not be reinstated and the escrow thereunder completed. An Order to Show Cause to that effect was issued with a hearing thereon set for May 15, 1967 [C. T. pp. 81-82].

On May 8, 1967, the Honorable Henry C. Westover, U. S. District Court Judge, issued an ex parte Order, without notice to interested parties, including Petitioners, vacating the Order confirming and approving the sale of the subject real property to Joe's Auto Parks [C. T. p. 83].

The Court dismissed Petitioners' Order to Show Cause on May 22, 1967 [C. T. pp. 146-149], and ordred the real property advertised for future sale. Petitioners filed objections to the Order and moved the Court for a rehearing on the Order, which was denied [C. T. pp. 182-183].

On August 3, 1967, an Ex Parte Order reinstating, approving and confirming the sale of the subject real property to Joe's Auto Parks was entered and filed with the Court [C. T. pp. 189-193].

Petitioners filed their first Notice of Appeal from the Ex Parte Order of April 26, 1967, vacating the Order of Sale to Petitioners filed February 10, 1967 [C. T. p. 79].

The second Notice of Appeal was filed by Petitioners from the Order of May 22, 1967, dismissing the Petitioners' Order to Show Cause [C. T. p. 180], and ordering that the Real Property be re-advertised and sold at a public sale.

The third Notice of Appeal was filed by Petitioners from the ex parte Order of August 3, 1967, reinstating, confirming and approving the sale of the subject real property to Joe's Auto Parks [C. T. p. 195].

Argument Amplifying the Reasons Relied on for the Allowance of the Writ.

The opinion of the Court below (App. I, *infra*) affirming the Orders of the District Court from which this appeal was taken is both shocking and an insult to the intelligence of this Court. It is completely devoid of citations to supporting legal authority. Had the Court below taken the time to study the law at issue in this case, it would have realized that it had rendered a de-

cision involving federal and constitutional questions in total disregard to the applicable decisions of this Court. Additionally, the Court below has condoned the District Court's denial of Petitioners' right to due process of law, as guaranteed to them by the Fifth Amendment to the Constitution of the United States, by affirming the District Court's Order of April 26, 1967, vacating the judicial sale to Petitioners ex parte, without giving Petitioners, as buyers thereto, notice and a hearing thereon as to the question of whether the sale should be set aside.

However, the judgment of the Court below disregards more than the constitutional protections afforded Petitioners under the due process clause of the Fifth Amendment to the Constitution. It also disregards the constitutional designation that this Court is the Supreme Court of the United States and that, where applicable, its decisions are the law of the land and must be followed by inferior courts under the policy of *Stare Decisis* in order to promote certainty, stability, and uniformity in the law. If there is to be any change in the law as enunciated by this Court in a former decision, it can only later be changed by this Court alone, and not by an inferior court.

It has long been settled that a sale by a Bankruptcy Court is a judicial sale. *In re Glas-Shipt Dairy Co.*, 239 Fed. 122 (7 Cir. 1917); *In re Winthrop Mills*, 109 F. Supp. 323 (Me. 1952); *In re Haywood Wagon Co.*, 219 Fed. 655 (2 Cir.), cert denied 238 U.S. 625, 35 S. Ct. 663, 59 L. Ed. 1495.

An Ex Parte Order vacating a confirmed judicial sale, without notice to the purchasers at that judicial

sale, violates due process of law as provided by the Fifth Amendment to the Constitution of the United States, and is in excess of the court's jurisdiction. *Halliday v. Stuart, supra.*

This Court, in *Blossom v. Milwaukee & C. R. Co., supra,* adopted without objection that portion of the opinion in *Delaplaine v. Lawrence,* 10 Paige 602, wherein the following was stated:

> ". . . in sales made by masters under decrees and order of this court, *the purchasers who have bid off the property and paid their deposits in good faith, are considered as having inchoate rights which entitle them to a hearing upon the question whether the sales shall be set aside.* And if the court errs by setting aside the sale improperly, they have the right to carry the question by appeal to a higher tribunal." (Emphasis added).

The opinion of the Court below is wholly encrusted with improper findings of fact concerning issues of waiver, estoppel, and whether the exchange of correspondence between the attorney for Petitioners and the attorney for the Reorganization Trustee resulted in a modification of the contract created by the "escrow instructions." (App. I, p. 18, *infra*). These findings of fact should have been determined by the Bankruptcy Court upon a hearing duly noticed to all affected parties. This was not done by the Bankruptcy Court. Moreover, the Court below limited its opinion and findings of fact to the misstated issue of the right of Petitioners to purchase real and personal property belonging to the estate (App. I, p. 13, *infra*) under a mere contractual relationship (App. I, p. 19, *infra*).

The decision of the Court below has destroyed the sanctity and integrity of judicial sales. It will have the effect of undermining confidence in judicial sales thereby defeating the purpose sought to be accomplished therefor. Public policy requires stability in judicial sales and that such sales be final. This policy, and its reasons, have been espoused by almost all other courts of appeals. *In re Winthrop Mills, supra; In re Burr Mfg. & Surety Co.*, (2 Cir.) 217 Fed. 16; *Rewabic Mining Co. v. Mason*, 145 U.S. 349, 12 S. Ct. 887, 36 L. Ed. 732; *J. J. Sugarman Co. v. Davis*, 203 F. 2d 931 (10 Cir. 1953); *Jacobson v. Larkey*, (3 Cir.) 245 Fed. 538; *Smith v. Save-Rite Drug Stores*, (10 Cir.) 178 F. 2d 507. Cogent reasons must exist to vacate judicial sales other than intervening higher bids. *Jacobson v. Larkey, supra; J. J. Sugarman Co. v. Davis, supra* at pp. 932-933.

Petitioners do not dispute the power of the Bankruptcy Court to vacate or modify its own orders. Petitioners do dispute however the reasons and methods used by the Bankruptcy Court in vacating the Order of Sale to Petitioners filed February 10, 1967. This Court's attention is directed to the Reporter's Transcript of the hearing of May 15, 1967, on the application to reinstate the vacated sale to Petitioners, wherein the following colloquy transpired between the Court and the attorney for Petitioners [R. T. May 15, 1967, p. 10, line 21, to p. 12, line 3].

> "The Court: Oh, I think the only thing that is important here is whether or not the Referee or the Court had a right to terminate that previous sale and enter into a subsequent sale. The equities, it seems to me, are with the Trustee. They were getting about $30,000.00 in additional money and

I don't know why a court can't change its opinion up until an order is actually signed.

"Mr. Frolich: But an order was signed—that is the point I am making.

"The Court: But it was set aside.

"Mr. Frolich: But, your Honor, that was a final order; and if a final order is ever going to be set aside it must be on notice, because if we have not received any notice we could not offend against it, we couldn't set up our equities, we could not set forth our position. If your Honor has seen our memorandum of points and authorities—

"The Court: I have seen it.

"Mr. Frolich: It is our contention—I have a case just handed me, your Honor.

This is In re Casaudoumecq. The citation is 46 Federal Supplement. On page 723, and I am reading:

'A bankruptcy court has continuous power to vacate or modify its own orders if no intervening or vested rights are disturbed', and they cite a lot of cases.

Now, over here there were intervening rights. It appears very simply, your Honor, that the only way that the original order, which was a final order and that was signed by your Honor, could be set aside was to serve notice upon Ullman and Simon, and in effect say:

'You didn't want to do it so we are setting it aside.'

Then, at that point, your Honor knows, we either do want to do it or we don't."

The Court below, in its opinion, states that "the contract did give the Trustee the right to abandon it." (App. I, p. 17, *infra*). Besides mischaracterizing Petitioners' relationship to the estate, the Court in effect is saying that the Trustee has the discretionary power to abandon judicially confirmed sales. The Bankruptcy Court is allowing the Trustee to become the final arbiter of judicial sales, endowing him with more power than the court itself has. Moreover, if this was the case, it would be an invalid delegation by the Bankruptcy Court of its power to sell property of the debtor under Bankruptcy Act, Section 116(3) (11 U.S.C. 516), which provides that the Court has the power to sell any property of the debtor "upon such terms and conditions *as the judge may approve.*" (Emphasis added).

Additionally, the escrow instructions dated February 10, 1967, are invalid under Bankruptcy Act, Section 116(3) *supra*. The Bankruptcy Court has in effect ratified and permitted the Trustee to execute escrow instructions subsequent to the Order of Sale filed February 10, 1967, whereby the Trustee gave himself the power to terminate the Judicial Sale without approval by the Bankruptcy Court. However, no where in the Escrow Instructions of February 10, 1967, is there any provision waiving notice, and a hearing thereon, to the parties affected thereby. The condition in the Escrow Instructions dated February 10, 1967, giving the Seller the right to abandon the escrow if the Seller determined he could not deliver possession of the parking lot within a reasonable period of time to the Buyer [C. T. p. 35] was not present in the Escrow Instructions dated February 3, 1967, and was not approved by the Bankruptcy Court and attached to and incorporated in the Final

Order of Sale filed February 10, 1967 [C. T. pp. 18-22].

Thus, the decision below has disregarded the applicable decisions of this Honorable Court and has now completely unsettled and disturbed the status of judicial sales in the Bankruptcy Courts. Moreover, the decision of the Court below has denied Petitioners due process of law as provided by the Fifth Amendment to the Constitution and it has affirmed the District Court's abuse of the rights of Petitioners, the original purchasers of the subject real property in the bankruptcy proceedings.

Wherefore, it is respectfully submitted that this Petition for Writ of Certiorari to review the judgment of the Court of Appeals for the Ninth Circuit should be granted.

JOHN N. FROLICH,

Attorney for Petitioners.

APPENDIX I.

Order Modifying Order of February 10, 1967, Prescribing Notice of Hearing to Consider Further Offers for Sale of Real Property and Directing Special Master to Hold Hearing.

United States District Court, Central District of California.

In the matter of Human Relations Research Foundation, a Washington corporation, and its subsidiaries, Educational Corporation of America, a California corporation, Universal Mortgage Corporation, a California corporation, Trans-America Property Corporation, an Oregon corporation, and La Pine Acres, Inc., an Oregon corporation, Debtors. In Proceedings for the Reorganization of a Corporation, No. 166803-HW.

Filed Apr. 26, 1967.

Upon the Application of the Reorganization Trustee, and no adverse interests appearing, and no notice being required, and good cause appearing therefor, it is hereby

ORDERED that Kyle Z. Grainger, Jr., as Reorganization Trustee, be and he hereby is authorized to terminate the pending sale escrow with George Ullman and Joe Simon and to return to said parties all deposits heretofore made by them on account of their purchase offer, and it is further

ORDERED that this Court's Order Confirming and Approving Sale of Real Property (929 South Hope Street) filed on February 10, 1967 and entered on February 14, 1967, be and it hereby is vacated to the extent the said Order approved and confirmed a sale of the

subject real property to George Ullman and Joe Simon, and it is further

ORDERED, that the offer of Morris M. Greenstein, in the amount of $290,000, or the real property described as:

> Lots 6, 7, 8, 9, 10 and the Southwesterly 10 feet of Lot 11 of Stilson's Subdivision of Block 64 of Ord's Survey, in the City of Los Angeles, in the County of Los Angeles, State of California, as per map recorded in Book 7, Page 34 of Miscellaneous Records, in the office of the County Recorder of said County

shall be brought on for hearing together with any other offers which may be made prior to or at the time of said hearing, before the Honorable JAMES E. MORIARTY, as Referee in Bankruptcy and Special Master herein, on May 1, 1967 at the hour of 1:30 P.M., and it is further

ORDERED, that the Reorganization Trustee shall give notice of the hearing to consider the offer of Morris M. Greenstein, and any other offers which may be made prior to or at the time of said hearing, in the form of notice attached hereto as Exhibit "A", by mail, to: the attorney of record for the debtor corporations; the attorney of record for University of America Foundation; and the attorney of record for George Ullman and Joe Simon, which notice shall be mailed, postage prepaid, to said attorneys not later than April 27, 1967, and it is further

ORDERED, that the Special Master shall not consider any other or different offers for said property other than the offer of Morris M. Greenstein unless

said other or different offers are in the amount of not less than $295,000 and unless said offers are accompanied by a deposit in the form of cashier's check or certified check in the amount of not less than $50,000, and it is further

ORDERED that at said hearing, the Special Master may, without further proceedings, approve and confirm the sale to Morris M. Greenstein, or such other offer and sale as may appear to be in the best interests of this estate and of its creditors, provided said other or different offer complies with the conditions hereinabove established.

Dated: April 26, 1967.

/s/ Harry C. Westover
Harry C. Westover, Judge,
United States District Court

SPECIAL MASTER'S RECOMMENDATIONS.

The foregoing Order is authorized by Bankruptcy Act §116 which permits the Reorganization Judge to authorize the Trustee to sell any property of the debtor upon such terms and conditions and upon such notice as the Judge may prescribe upon cause shown. Entry of the foregoing Order appears in the best interests of these debtor estates and is recommended by your Special Master.

Dated: April 26, 1967.

/s/ James E. Moriarty
Referee in Bankruptcy and
Special Master

Order Denying Application of George Ullman and Joe Simon Filed May 5, 1967, Dismissing Order to Show Cause In Re Application of George Ullman and Joe Simon Issued May 5, 1967 and Enjoining and Restraining Parties.

United States District Court, Central District of California.

In the Matter of Human Relations Research Foundation, a Washington corporation, and its subsidiaries, Educational Corporation of America, a California corporation, Universal Mortgage Corporation, a California corporation, Trans-America Property Corporation, an Oregon corporation, and La Pine Acres, Inc., an Oregon corporation, Debtors. In Proceedings for the Reorganization of a Corporation. No 166803-HW.

Filed May 22, 1967.

The Application of George Ullman and Joe Simon filed herein on May 5, 1967 and entitled "APPLICATION OF GEORGE ULLMAN AND JOE SIMON FOR AN ORDER TO SHOW CAUSE WHY THE ORDER PRESCRIBING NOTICE OF HEARING TO CONSIDER FURTHER OFFERS FOR THE SALE OF 929 SOUTH HOPE STREET AND AUTHORIZING CONFIRMATION OF SAID SALE SHOULD NOT BE VACATED AND THE PREVIOUS ORDER CONFIRMING AND APPROVING SALE OF REAL PROPERTY (929 South Hope Street) FILED FEBRUARY 10, 1967, AND ENTERED FEBRUARY 14, 1967, SHOULD NOT BE REINSTATED AND THE ESCROW THEREUNDER COMPLETED" came on for hearing on May 15, 1967 before the undersigned Judge of the United States District Court in accordance with the Order to

Show Cause issued in connection with said Application. The applicants, George Ullman and Joe Simon, appeared, were personally present in the Courtroom and were represented by their attorney of record, JOHN N. FROLICH, Esq. The Reorganization Trustee appeared, was personally present in the Courtroom and was represented by his attorneys of record, GENDEL, RASKOFF, SHAPIRO & QUITTNER, by ARNOLD M. QUITTNER, Esq. Upon considering the said Application and considering the Response, Application for Relief, and Counter-Claim of Kyle Z. Grainger, Jr. and previous proceedings herein, and upon hearing the statements of counsel, and no evidence having been offered, and it appearing that George Ullman and Joe Simon and their attorney, and others present in the Courtroom may attempt to institute proceedings in the State Courts of California, or may attempt to take some other action, step or proceeding to cloud the title of the Reorganization Trustee in order to prevent the consummation of a sale by the Reorganization Trustee to others, and that irreparable harm and injury will occur to the reorganization estate if any persons are permitted to take or institute any action or proceeding or to give any notice affecting or purporting to affect the Reorganization Trustee's title to the subject property, except upon prior application to the Reorganization Court, and it appearing that it would not be a hardship upon any of said parties to enjoin and restrain them from any such action, except upon prior application to the Reorganization Court, and good cause appearing therefor, it is hereby

ORDERED, ADJUDGED AND DECREED that George Ullman and Joe Simon have no right, title or

interest, lien, charge or encumbrance in or to or against the real property sometimes known as 909-911 and 929 South Hope Street and legally described as:

> Lots 6, 7, 8, 9, 10 and the southwesterly 10 feet of Lot 11 of Stilson's Subdivision of Block 64 of Ord's Survey, in the City of Los Angeles, in the County of Los Angeles, State of California, as per map recorded in Book 7, Page 34 of Miscellaneous Records, in the office of the County Recorder of said County,

and it is further

ORDERED that the said Application of George Ullman and Joe Simon be and it hereby is denied, and the Order of Show Cause issued on said Application be and it hereby is dismissed provided, however, that the denial of the Application and the dismissal of the Order to Show Cause is without prejudice to the right of Ullman and Simon to institute a proceeding in the Reorganization Court against the reorganization estate and the Reorganization Trustee for damages on account of a claim of breach of contract, and nothing herein shall be deemed to be an adjudication with respect to the existence or non-existence of a cause of action for damages, and it is further

ORDERED that this Court's Order filed herein on April 26, 1967 entitled "ORDER MODIFYING ORDER OF FEBRUARY 10, 1967, PRESCRIBING NOTICE OF HEARING TO CONSIDER FURTHER OFFERS FOR SALE OF REAL PROPERTY AND DIRECTING SPECIAL MASTER TO HOLD HEARING" shall remain in full force and effect, and it is further

ORDERED that all persons present in the Courtroom on May 15, 1967 at the hearing of the Application of George Ullman and Joe Simon, and their employees, agents and attorneys, specifically including, but not limited to, George Ullman and Joe Simon, and their attorney, John N. Frolich, be and they hereby are restrained and enjoined from commencing or instituting any legal action or giving or purporting to give any notice or from taking any action or proceeding, directly or indirectly, which affects or purports to affect title to the real property sometimes known as 909-911 and 929 South Hope Street and legally described as:

> Lots 6, 7, 8, 9, 10 and the Southwesterly 10 feet of Lot 11 of Stilson's Subdivision of Block 64 of Ord's Survey, in the City of Los Angeles, in the County of Los Angeles, State of California, as per map recorded in Book 7, Page 34 of Miscellaneous Records, in the office of the County Recorder of said County

except only upon prior application to and consent from the Reorganization Court and except only that this restraint does not include such pleadings as may be filed in connection with any appellate proceedings, and it is further

ORDERED that the counter-claim of the Reorganization Trustee, insofar as it seeks a judgment for money damages, be and it hereby is dismissed as premature, without prejudice, however, to the right of the Reorganization Trustee to reassert the claims set forth in the counter-claim in response to any action instituted by Ullman and Simon or as an independent action, and it is further

ORDERED that the Reorganization Trustee shall prepare and file appropriate Application with the Reorganization Court for an Order authorizing a sale of the subject real property and for an Order prescribing notice and date of hearing in connection therewith.

DATED at Los Angeles, California in said District on May 22nd, 1967.

Harry C. Westover
United States District Judge

The foregoing Order is hereby disapproved as to form & content.

Dated: May 16, 1967.

Letter of Objections will follow this date John N. Frolich.

/s/ John N. Frolich
John N. Frolich, Attorney
for Applicants, George
Ullman and Joe Simon

Order Reinstating and Approving and Confirming Sale of Real Property (929 So. Hope Street) to Joe's Auto Parks.

United States District Court Central District of California.

In the Matter of Human Relations Research Foundation, a Washington corporation, and its subsidiaries, Educational Corporation of America, a California corporation, Universal Mortgage Corporation, a California corporation, Trans-America Property Corporation, an Oregon corporation, and La Pine Acres, Inc., an Oregon corporation, Debtors. In Proceedings for the Reorganization of a Corporation No. 166 803-HW

Filed Aug. 3, 1967.

On April 26, 1967 this Court made and entered its Order vacating a prior Order of Sale concerning the real property commonly known as 929 South Hope Street and more particularly described in the legal description attached hereto and marked Exhibit "A" and by this reference incorporated herein. In said Order of April 26, 1967, this Court directed the Reorganization Trustee to bring on for consideration the offer of MORRIS M. GREENSTEIN and any other offers for the purchase of said real property which might be made prior to or at the time of the hearing which was directed to be held by the HONORABLE JAMES E. MORIARTY as Referee in Bankruptcy and Special Master on May 1, 1967. In accordance with this Court's said Order of April 26, 1967, notice was given and a hearing held on May 1, 1967 at which time the highest and best offer for the subject property was the sum of $309,000.00 bid by JOSEPH H. LUMER, ARTHUR LUMER, JACOB LUMER and GABRIEL RUBIN,

co-partners doing business as JOE'S AUTO PARKS. Upon the conclusion of the hearing conducted by the Special Master an Order was made and entered herein on May 4, 1967 approving and confirming the sale of the subject property to JOE'S AUTO PARKS. On an Ex Parte Application made by attorney JOHN N. FROLICH, on behalf of GEORGE ULLMAN and JOE SIMON, who had bid on the subject property at a prior sale, this Court entered its Minute Order of May 8, 1967, vacating the said Order of May 4, 1967, confirming and approving the sale of real property, (929 So. Hope Street) to JOE'S AUTO PARKS, a co-partnership. Thereafter, the Application of GEORGE ULLMAN AND JOE SIMON for an Order vacating the authority of the Reorganization Trustee to effect the sale to JOE'S AUTO PARKS and for an Order reinstating and approving and confirming a sale to ULLMAN and SIMON came on for hearing before this Court on May 15, 1967. On May 22, 1967, this Court entered its Order denying the Application of GEORGE ULLMAN and JOE SIMON and ordered the Reorganization Trustee to prepare and file an appropriate application with the Reorganization Court for a further Order authorizing a further sale of the subject real property. On June 8, 1967, ULLMAN and SIMON filed a Notice of Motion for re-hearing concerning the Application filed by them on May 5, 1967 and for reconsideration of this Court's said Order of May 22, 1967, denying the Application of ULLMAN and SIMON. On June 21, 1967, this Court entered its Order denying the motion of ULLMAN and SIMON for rehearing. In the interim, JOE'S AUTO PARKS filed its motion for an Order

reinstating the sale to JOE'S AUTO PARKS approved by this Court's Order of May 4, 1967 and for an Order vacating that portion of this Court's Order of May 22, 1967 which required the Reorganization Trustee to file further application for an Order authorizing a further sale of the subject real property.

The said motion of Joe's Auto Parks and the response thereto by the Reorganization Trustee came on for hearing before the Honorable Harry C. Westover, Judge of the United States District Court on June 26, 1967. JOE'S AUTO PARKS was present and represented by its attorney, LEONARD A. GOLDMAN; the Reorganization Trustee was present and represented by his counsel GENDEL, RASKOFF, SHAPIRO & QUITTNER, by FRANK C. CHRISTL. Upon considering all of the pleadings on file herein and upon hearing arguments of counsel and it appearing that the sale conducted on May 1, 1967 was held in accordance with this Court's prior Orders and in accordance with the applicable provisions of Chapter X of the Bankruptcy Act, and it appearing that said sale was conducted in a fair and equitable manner, and that the high bid of JOE'S AUTO PARKS, in the amount of $309,000.00 was and is the highest and best offer and that acceptance of the said offer is in the best interests of these Debtor estates and their creditors,

NOW THEREFORE, it is hereby

ORDERED that this Court's Order of May 24, 1967 approving and confirming sale to JOE'S AUTO PARKS be and it hereby is reinstated and the sale of the real property sometimes known as 929 South Hope Street and more particularly described in Exhibit

"A" hereto, to JOE'S AUTO PARKS be and it hereby is approved and confirmed and the Reorganization Trustee be and he hereby is authorized to enter into and execute escrow instructions and execute and deliver deeds, disbursement instructions and such other documents as may be appropriate and necessary to fully and finally consummate the said sale and to disburse from the funds of these estates such amounts as may be necessary in connection with escrow costs, title insurance premiums and related costs and, in addition, upon the close of escrow, to disburse from the sales proceeds a finder's fee in an amount not to exceed two and one-half (2½%) per cent of the sales price, provided however, that if the Reorganization Trustee and the buyer are unable to agree upon escrow instructions which shall take into consideration the pendency of appeals by GEORGE ULLMAN and JOE SIMON, then in that event the Reorganization Trustee may apply to this Court for an Order vacating the sale to JOE'S AUTO PARKS without any liability of any kind whatsoever to the Reorganization Trustee or these Debtor estates.

Dated: Aug. 3rd, 1967

Harry C. Westover
UNITED STATES DISTRICT
JUDGE

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

George Ullman & Joe Simon, interested parties, *Appellants*, vs. Kyle Z. Grainger, Jr., et al., *Appellees*. No. 22,153, 22,153-A.

[June 18, 1968]

Appeal from the United States District Court for the Central District of California.

Before: BARNES and ELY, Circuit Judges, and SMITH,* District Judge.

Kyle Z. Grainger, Jr., is the Reorganization Trustee (Trustee) in a proceeding under Chapter 10 of the Bankruptcy Act.[1] This appeal from three orders made by the Bankruptcy Court raises one question: i.e., the right of appellants Ullman and Simon to purchase some real and personal property which were assets of the estate.

In December, 1966, the Court ordered that the property be sold. A hearing was had on January 19, 1967; and on February 10, 1967, an order was entered which provided, in part:

> ". . . that the Court finds that the offer of George Ullman and Joe Simon, as more particularly set forth in the Escrow Instructions attached hereto, marked Exhibit 'A' and by this reference incorporated herein, is the highest and best offer ob-

*Hon. Russell E. Smith, United States District Judge, District of Montana, sitting by designation.
SMITH, District Judge.

[1]11 U.S.C. Chapter 10, §§ 501 to 675.

tainable by the Reorganization Trustee and that the acceptance of each offer is in the best interests of this estate and of its creditors, . . ."

The Escrow Instructions which were attached to the order were dated February 3, 1967, but were not signed by the parties. They did, however, contain this clause:

"'Seller believes that the only lease on the subject property in effect at the present time is a lease between seller's predecessor in title and the Parking Lot Operator, and that said lease contains a cancellation provision providing that any new purchaser of said property may cancel said lease upon 30 days written notice. *The offer to purchase subject property is conditioned upon a 30 day cancellation clause in said Parking Operator's Lease.*'" (Emphasis added)

On February 10, 1967, Escrow Instructions were executed by the parties. These instructions contained the above quoted clause and also additional clauses which had not been incorporated in the February 3rd instructions:

"33) In the event that buyer is ready to close this escrow within the initial period of 30 days or in any extended period as set forth in paragraph 2 above, and seller is not able to deliver possession of the parking lot premises to buyer at the time when escrow is ready to be closed by buyer by the deposit of the balance of the funds due from him, then *it is agreed that seller and not buyer will be charged with the pro-ration of interest on the first trust deed and taxes from that period of time when the escrow could have been closed by the buyer*

until the time when the escrow actually closes. Seller shall have the right to abandon this escrow if he determines that he cannot deliver possession of the parking lot within a reasonable period of time to buyer.

* * *

"4) In the event that this escrow fails to close due to any default or inability of the seller to deliver a good and marketable title or any other default on the part of the seller, *then seller's sole responsibility to buyer shall be the return of buyer's deposit of $27,500.00* without offsets or costs, and seller agrees to pay all escrow and title charges incurred." (Emphasis added)

The first quoted clause referred to a lease which had been given to Charter Auto Parks, a parking lot operator. Charter Auto Parks was in possession of the property and the lease under which it held possession did not contain a third day cancellation clause. It is sufficient for the purposes of this opinion to say that the lease did create a possession problem. On March 23, 1967, the attorney for the Trustee wrote the attorney for the appellants as follows:

"* * * Under the existing circumstances and in view of the apparent intent of Charter Auto Parks to litigate the matter, the Trustee now advises you on behalf of the buyers (George Ullman and Joe Simon) that it appears unlikely that possession of the parking lot can be delivered within a reasonable period of time and, accordingly, it now appears that the Trustee will be required to refund the deposit of $27,500. Please advise me on or before 5:00 p.m., March 30, 1967, whether the

buyers will accept the property subject to whatever rights have been created in Charter Auto Parks or their successors by reason of the lease of January 20, 1966."

Appellants, through their attorneys, replied on April 13 as follows:

"* * * Under the circumstances, it occurs to me that arrangements can be made between us that (1) the escrow closes and title be delivered to Ullman and Simon, and (2) that you proceed with your action to obtain possession of the parking lot in a diligent manner and I will do everything in my power to assist in said litigation.

"I have advised my clients of the probability that even if there is a verdict in favor of the re-organization trustee in the bankruptcy court, there is always the possibility of a review and appeal. I pointed out to my clients, Ullman and Simon, that this may delay their obtaining actual possession of the property for some period of time. However, I recommended to them that they complete their sale of the subject property at 929 South Hope Street and close the escrow as soon as you are prepared to deliver title to them upon the agreement of the reorganization trustee that he will proceed diligently as outlined above.

"Under the circumstances you are advised that it is our desire to complete the sale as set forth above."

On April 26, 1967, the Trustee procured an *ex parte* order vacating the court order of February 10, which confirmed the sale to appellants and ordered a hearing

to consider a sale to other parties. Nothing was then left to be done to abandon the contract except to return the deposit of $27,500.00 as provided in paragraph 4 of the contract. On the same day the Trustee, through his attorney, advised the escrow holder to return the deposit of $27,500.00. At that hearing, on May 1, 1967, Joe's Auto Parks bid $309,000.00 for the real property, and on May 4th an order was entered approving the sale to Joe's Auto Parks. On May 5th appellants procured an *ex parte* order vacating the order confirming the sale to Joe's Auto Parks and an order directing the Trustee to show cause why the sale to appellants should not be completed. On May 22nd, after a hearing, an order was issued denying relief to appellants, and on June 21, 1967 an order was entered denying appellants' petition for rehearing.

Appellants now contend that there was a contract of sale which resulted in an equitable conversion under California law;[2] that they had rights which could not be terminated without a hearing after notice and that upon a hearing the court, respecting the sanctity of judicial sales, should have required the Trustee to proceed with the sale to appellants. All of these contentions ignore the fact that the contract did give the Trustee the right to abandon it.

Both parties were concerned with the possession problem. Appellants protected themselves by conditioning their offer upon the existence of a thirty day cancellation clause in the Charter Auto Parks' lease. The Trustee, who, if unable to deliver possession, was re-

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[2]It is extremely doubtful if a contract conditioned as this one was would ever result in an equitable conversion, but we need not reach that problem.

quired to pay interest on a substantial loan and taxes, protected himself by providing that he might abandon the contract and return the money. When the Trustee discovered that there was no cancellation clause and that he did have a possession problem, he had a right to abandon the contract. If it be assumed that at any time prior to the time that the Trustee did abandon the contract the appellants might have waived the provisions of it relative to possession, which were for their benefit, and thus have destroyed the Trustee's right to abandon—that did not happen.

If the Trustee's letter of April 13th was an offer to waive the Trustee's right to abandon in exchange for appellants' promise to purchase subject to the Charter Auto Parks' lease, there was no acceptance of that offer. Appellants, instead of unconditionally accepting the terms of the Trustee's letter, rejected it by inserting a condition that the Trustee should litigate the possession problem with Charter Auto Parks. Appellants did not agree that they would waive the provisions of the escrow instructions requiring the Trustee to pay interest and taxes in the event he was unable to deliver possession as required. This exchange of correspondence did not result in a modification of the contract created by the escrow instructions.

Authorities are cited to the effect that a sale in bankruptcy is a judicial sale and that the integrity of judicial sales should be preserved. We agree. In this case the Trustee did no violence in exercising the right to abandon. He did not abrogate the contract—he simply exercised a right given to him by the contract.

Appellants complain about a lack of notice. The order which finally confirmed the action of the Trustee

in abandoning the contract was made after notice and a hearing. If the action of the Trustee in abandoning required court approval, that approval was given.

Appellants would be entitled to prevail if the Trustee could not abandon the contract without court approval given after a hearing and prior to the act of abandonment, if the appellants had a right to notice of that hearing and a right pending the hearing to change their offer by eliminating the condition in it, and if such a charge would cancel out the Trustee's right to abandon. We are unable, however, to read into any notice provisions of the bankruptcy law a right in a party who bears a contractual relationship with the estate to a notice of hearing, so that pending the hearing he may alter his contractual relations with the estate.

The orders are affirmed.

APPENDIX II.

Judgment.

United States Court of Appeals for the Ninth Circuit.

George Ullman & Joe Simon, interested parties, Appellants, vs. Kyle Z. Grainger, Jr., et al. Appellees. No. 22153, 22153A.

Appeal from United States District Court for the Central District of California.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered June 18, 1968.

SUPREME COURT, U. S.

IN THE

JAN 20 1969

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1968
No. 855

GEORGE ULLMAN and JOE SIMON,

Petitioners,

vs.

KYLE Z. GRAINGER, JR.,

Respondent.

BRIEF IN OPPOSITION FOR RESPONDENT, KYLE Z. GRAINGER, JR.

ARNOLD M. QUITTNER,
JERROLD K. GUBEN,
Attorneys for Respondent, Kyle Z. Grainger, Jr.

GENDEL, RASKOFF, SHAPIRO & QUITTNER,
6380 Wilshire Boulevard,
Los Angeles, California 90048,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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TABLE OF AUTHORITIES CITED

Case	Page
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United States Code, Title 11, Sec. 501	1
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4A Collier on Bankruptcy (14th Ed. 1967), p. 1198	7

IN THE

Supreme Court of the United States

October Term, 1968
No. 855

GEORGE ULLMAN and JOE SIMON,

Petitioners,

vs.

KYLE Z. GRAINGER, JR.,

Respondent.

BRIEF IN OPPOSITION FOR RESPONDENT, KYLE Z. GRAINGER, JR.

This Brief in opposition to the Petition for a Writ of *Certiorari* is submitted on behalf of the Reorganization Trustee appointed under the provisions of Chapter X of the Bankruptcy Act (11 U.S.C. §501).

Introduction.

The Petition for Writ of *Certiorari* seeks review by this Court of the decision of the United States Court of Appeals for the Ninth Circuit entered on June 18, 1968. The opinion of the court of appeals is reported at 396 F. 2d 635 (9th Cir. 1968). The judgment and opinion of the court of appeals determined three separate appeals (subsequently consolidated) from three separate orders concerning the sale and subsequent resale of certain real property of the Reorganization Estate. The Orders affirmed were:

1. The Order of the district court of April 26, 1967 entered *ex parte* vacating the prior Order approving sale to Ullman and Simon [Cl. Tr. 27].*

2. The Order of the district court entered May 22, 1967 after full hearing denying the Petition of Ullman and Simon for reinstatement of the Order approving sale [Cl. Tr. 146].

3. The Order of the district court entered August 3, 1967 approving and confirming the sale of the real property to another party (Joe's Auto Parks) [Cl. Tr. 190].

Counterstatement of the Case.

The Reorganization Trustee offered certain real property of the Estate for sale in the courtroom of the Special Master and Referee in Bankruptcy. An offer of $275,000 was made by Petitioners Ullman and Simon and an Order approving the sale and authorizing the Trustee to sign escrow instructions was entered February 14, 1967 [Cl. Tr. 18]. The escrow instructions attached to the Order approving sale were not signed and were subsequently superseded by signed escrow instructions dated February 10, 1967 [Cl. Tr. 33]. (Appendix A hereto). The obligation of the Trustee to complete the sale was expressly conditional due to the Estates relatively small equity in the property over existing encumbrances and taxes and the burden of the continuing accumulation of interest and taxes upon the Trustee. The escrow instructions also reserved to the Trustee the privilege of abandoning the escrow if he determined he could not deliver possession of the property free of an existing

*Cl. Tr. refers to the Clerk's Transcript of the Record.

parking lot lease and limited the Trustee's liability for failure to close the escrow to the return of the buyer's deposit and payment by the Trustee of all escrow and title charges (Appendix A, p. 4, paragraph 4 of the escrow instructions).

While the escrow was pending, the Trustee was advised that the parking lot lease on the real property did not contain a cancellation clause. Nevertheless, the Trustee attempted to compel or negotiate a surrender of the premises by the auto park lessee, but those attempts failed. The Trustee's counsel immediately advised Petitioners' counsel of the results of the negotiations in a letter dated and mailed March 23, 1967 [Cl. Tr. 109]. (Appendix B hereto). The letter of March 23, 1967 advised the buyers that the Trustee would be required to refund their deposit and cancel the sale unless the buyers would accept the property subject to whatever rights had been created in the tenant. The buyers refused to accept the property under those conditions, but instead sought to require the Trustee to undertake litigation against the tenants [Cl. Tr. 116].

Shortly thereafter, the Reorganization Trustee, acting under the terms of the escrow, obtained an *ex parte* Order authorizing the return of the buyers' deposit and abandonment of the sale escrow (The Order of the district court of April 26, 1967) [Cl. Tr. 27]. Thereafter, the property was reoffered for sale subject to the parking lot lease. After spirited bidding in which Petitioners did not participate, a high bid of $309,000 was made by Joe's Auto Parks. The sale was approved and confirmed by the court's Order of May 4, 1967 [Cl. Tr. 42].

On May 5, 1967, without notice to the Trustee, Petitioners filed an *ex parte* Application for an Order vacating the court's Order of April 26, 1967 (which authorized the Trustee to abandon the escrow) and for an Order reinstating the prior sale Order of February 14, 1967 in favor of Petitioners Ullman and Simon [Cl. Tr. 50]. After a lengthy hearing, the Petition to reinstate the sale to Ullman and Simon was denied and the Order of April 26, 1967 authorizing abandonment of the sale to Ullman and Simon was reinstated [Cl. Tr. 146]. Petitioners filed a Motion for rehearing which was heard at great length on June 19, 1967 [Cl. Tr. 158]. On June 21, 1967, the court entered its Order denying the Motion for rehearing. Thereafter, on August 3, 1967, the reorganization court entered its Order reinstating and approving the sale to Joe's Auto Parks for $309,000 [Cl. Tr. 182].

Counterstatement of Questions Proposed.

The Petition herein does not present any question which is sufficiently special or important to warrant review by this Court. This case does not involve questions of due process, nor of the integrity of judicial sales, but involves simply a question of contract interpretation and the application of ordinary principles of contract law.

ARGUMENT.

I.

Certiorari Should Not Be Granted to Review a Judgment Based Upon Application of Settled Principles of State Contract Law to Particular Facts.

This case does not involve rules of law concerning which there is any conflict among the courts of appeals or between the decision below and applicable decisions of this Court. The court of appeals' decision does not rest upon any unsettled questions of federal or state law; rather, this case concerns the application of settled principles of contract law and the exercise of judicial discretion.

The sole question presented is the buyers' right to specific performance of the contract of sale against the Reorganization Trustee, in spite of the failure of express conditions precedent and the privilege reserved by the Trustee to abandon the sale contract upon refunding the buyers' deposit and payment of escrow costs. The question is one of contract interpretation and application of California law.

II.

This Case Does Not Present Any Issue of (1) Due Process, (2) Sanctity of Judicial Sales, or (3) the Granting to the Reorganization Trustee the Discretionary Power to Abandon Confirmed Sales.

1. Due Process.

Petitioners contend that vested, unconditional property rights were taken from them by an *ex parte* Order of the reorganization court. The facts are quite to the contrary. The rights vested in Petitioners

by the sale contract were expressly conditioned upon a 30 days cancellation clause in a parking lot lease. The lease had no cancellation clause and by the terms of the contract, the Trustee was privileged to abandon it without any liability except only to refund the buyers' deposit and to pay the escrow fees. The Reorganization Trustee promptly and fully complied with the contract by directing the escrow holder to return the buyers' funds and to charge the Reorganization Trustee with the fees and costs. Although it was not legally necessary for the Trustee to seek an Order of the reorganization court, he did so on his counsel's advice in order to provide authority to return from the general funds of the Estate the $5,000 portion of the sale deposit theretofore made by buyers with the Trustee.

Even if it be conceded, *arguendo,* that Petitioners were entitled, as a matter of right, to notice and to a hearing on the Trustee's Application for authority to terminate the pending escrow and return to the buyers their deposit that error has been cured by the subsequent actions of the reorganization court. On May 5, 1967, without notice to the Reorganization Trustee, these Petitioners filed an Application with the reorganization court for an Order vacating the court's Order of April 26, 1967 and for an Order reinstating the prior sale Order of February 10, 1967. On May 5, 1967, an Order to Show Cause was issued *ex parte* on Petitioners' Application and on May 8, 1967, the reorganization court issued an *ex parte* Order vacating its Order of May 4, 1967 which had approved and confirmed the sale of May 1, 1967 to Joe's Auto Parks. After a lengthy hearing before the reorganization court on May 15, 1967 [R. Tr. Vol. III]* the court denied the Motion of

*R. Tr. III—Reporter's Transcript, Volume III.

Petitioners and reinstated the Order of April 26, 1967.

Petitioners filed a tardy Motion for rehearing on June 8, 1967 and although the Motion was not timely under Rule 59b of the Federal Rules of Civil Procedure, nevertheless the reorganization court conducted another full hearing and then denied the Motion.

In short, even if Petitioners had a right to prior notice of the Trustee's Application filed April 26, 1967, they were granted two hearings on that Application and, pending the full hearings, the court suspended or vacated its prior Orders of April 26, 1967 and May 4, 1967. Petitioners cannot, in good faith, claim any lack of due process in these proceedings.

2. Sanctity of Judicial Sales.

Respondent agrees that a sale in bankruptcy is a judicial sale and that the integrity of judicial sales should be preserved, but as the court of appeals pointed out, the Trustee did not attempt to abrogate any of the terms of the sale; instead, the Trustee simply exercised rights expressly granted him by the contract of sale.

Petitioners ignore the express terms and conditions of the escrow instructions and have presented their case as though it involved merely the vacating of an unconditional Order confirming sale. However, as Collier points out "the rights and quantum of property acquired by the purchaser depend primarily upon the terms of the sale as ordered or *agreed upon.*" (Emphasis supplied).

4A Collier on Bankruptcy, 1198 (14th Ed. 1967).

For a similar case see *Walker v. Harper,* 133 F. 2d 418 (5th Cir. 1943), which also involved a conditional sale.

3. The Granting to the Reorganization Trustee the Discretionary Power to Abandon Confirmed Sales.

The Petitioners allege that the decision of the district court as affirmed by the court of appeals has granted to the Trustee the discretionary power to abandon judicially confirmed sales. This is a gross misstatement of the instant case. The power to abandon the sale was reserved by the Reorganization Trustee in the contract of sale, and the Order confirming sale merely authorized the Trustee to conclude the sale. If the contentions of Petitioners were accepted, a bankruptcy or reorganization trustee would be at a greater disadvantage in effecting sales than a private party and would be judicially bound to complete a sale although conditions precedent have failed or the buyer has breached his covenants.

Conclusion.

This case was carefully considered by three courts below: The Referee in Bankruptcy and Special Master, the district court and the court of appeals. It does not present any novel questions, any conflict among the circuits or even any federal or bankruptcy question. It merely involves the application of well settled principles of contract law to a particular fact situation.

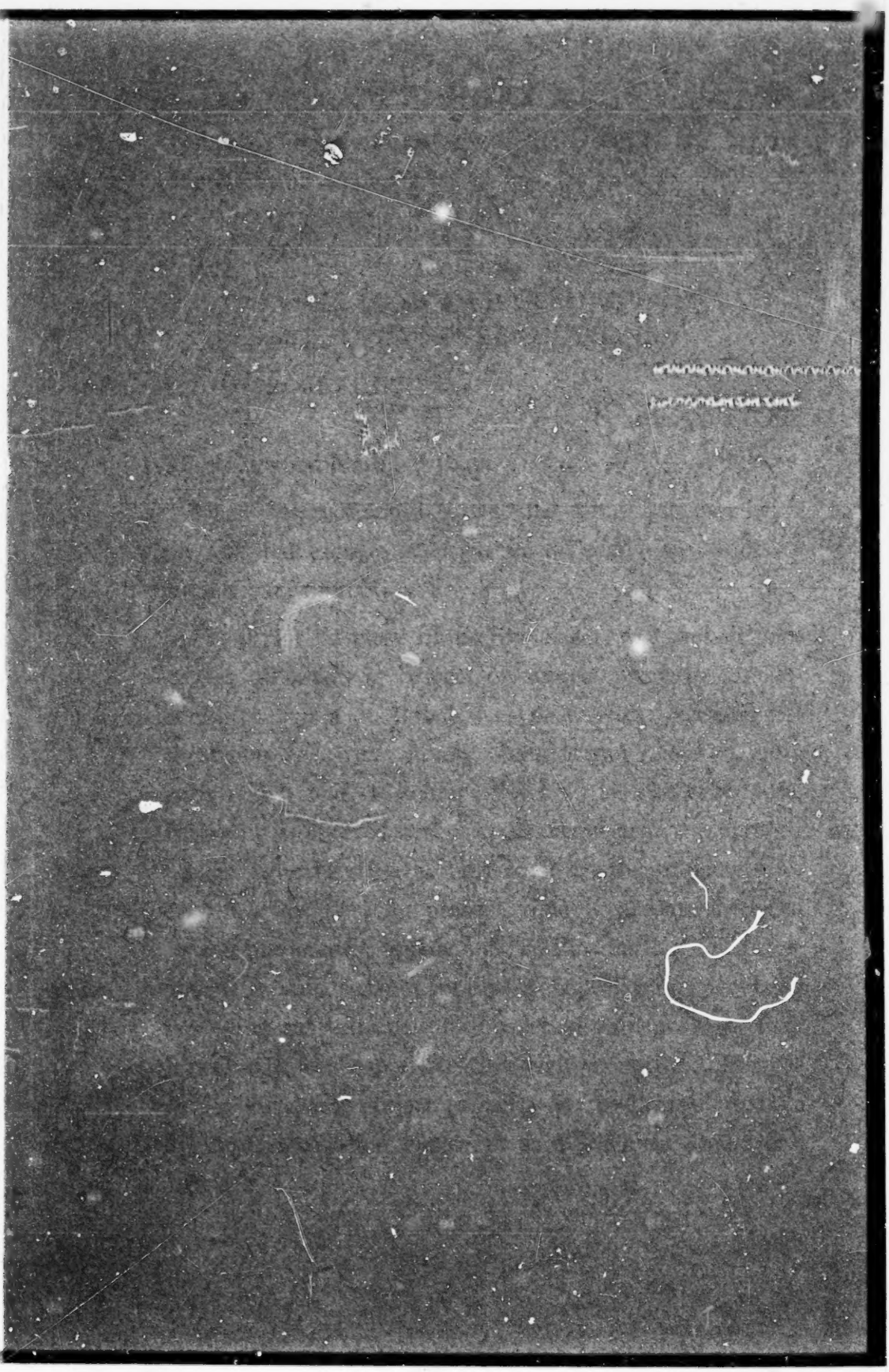
The Petition for Writ of *Certiorari* should be denied.

Dated: January 13, 1969.

Respectfully submitted,

ARNOLD M. QUITTNER,
JERROLD K. GUBEN,
Attorneys for Respondent, Kyle Z. Grainger, Jr.

GENDEL, RASKOFF, SHAPIRO &
QUITTNER,
Of Counsel.



APPENDIX A.

Superseding previous instructions which are hereby cancelled, null and void.

HOLLYWOOD NATIONAL BANK

Page 2

ESCROW DEPARTMENT
ESCROW INSTRUCTIONS

Escrow No. 363-GB

February 10, 1967

To Hollywood National Bank

These instructions are executed simultaneously with the original escrow instructions of even date, and are made a part thereof.

(1) Prior to close of escrow seller will deliver into escrow all leases in respect of subject property for delivery to buyer at close of escrow, with executed assignments in buyer's favor. As a matter of record only with which escrow holder is not to be concerned, the following is entered herein at the request of the parties: "Seller believes that the only lease on the subject property in effect at the present time is a lease between seller's predecessor in title and the Parking Lot Operator, and that said lease contains a cancellation provision providing that any new purchaser of said property may cancel said lease upon 30 days written notice. The offer to purchase subject property is conditioned upon a 30 day cancellation clause in said Parking Operator's Lease."

(2) Buyer has heretofore paid to seller, outside of this escrow the sum of $27,500.00. In the event buyer fails to deposit the balance of the funds within 30 days from date hereof, and provided seller has performed everything required of him in order to close this escrow, then in that event, this escrow may be extended for an additional 90 days at the sole option of the buyer by written notice to escrow holder and to seller, but upon buyer so extending this escrow, seller shall be entitled to apply to interest on the note secured by first trust deed of record, and taxes accruing during the escrow period such portion of the $7,500.00 deposit retained by seller outside of escrow, as may be required on a pro-rata basis up to the actual date of closing this escrow. The maximum liability of buyer for said proration of the aforesaid interest on the first trust deed and taxes shall not exceed $2,000.00 per month. In the event that this escrow fails to close within the additional 90 day period due to any default on the part of the buyer, then in that event this escrow shall be deemed terminated and all documents deposited by seller shall be returned to seller. The following is entered herein at the request of the buyer and seller as a matter of record only with which escrow holder is not to be concerned: "In the event of such aforementioned termination seller shall retain the balance of said $27,500.00 deposit as liquidated damages and neither buyer nor seller shall thereafter have any claims, demands or causes of action, one against the other, nor shall buyer have any right, title or interest, lien, charge or encumbrance in or to or against said real property. The purchase of the personal property is conditioned upon

the buyer completing the purchase of the real property and likewise, the purchase of the real property is conditioned upon the buyer completing the purchase of the personal property. With respect to the right of seller to apply to interest and taxes a portion of the $27,-500.00 deposit as provided herein, to the extent of such application, the seller must be reimbursed prior to close of escrow so that at close of escrow the seller will have not less than $27,500.00 on hand. As an example, in the event that the escrow is extended beyond the initial 30 days and into the additional 90 day period, and if, during said 90 day period, the seller is entitled to apply to interest and taxes the total sum of $5,-000.00 from the deposit so that the deposit is reduced to $22,500.00, then buyer must, prior to close of escrow, pay to seller an additional $5,000.00 to bring the deposit back up to the original $27,500.00 level."

(3) In the event that buyer is ready to close this escrow within the initial period of 30 days or in any extended period as set forth in paragraph 2 above, and seller is not able to deliver possession of the parking lot premises to buyer at the time when escrow is ready to be closed by buyer by the deposit of the balance of the funds due from him, then it is agreed that seller and not buyer will be charged with the pro-ration of interest on the first trust deed and taxes from that period of time when the escrow could have been closed by the buyer until the time when the escrow actually closes. Seller shall have the right to abandon this escrow if he determines that he cannot deliver possession of the parking lot within a reasonable period of time to buyer.

Superseding previous instructions which are hereby cancelled, null and void.

HOLLYWOOD NATIONAL BANK

Page 3

ESCROW DEPARTMENT
ESCROW INSTRUCTIONS

Escrow No. 363-GB

February 10, 1967

To Hollywood National Bank

These instructions are executed simultaneously with the original escrow instructions of even date, and are made a part thereof.

(3) Continued from page 2

In that event there shall be no liability on the part of the seller except to pay escrow and title expenses incurred, and the seller will be required to return to the buyer the sum of $27,500.00 previously deposited with Kyle Z. Grainger, Jr., the Trustee herein, of which the sum of $7,500.00 has been retained by said Kyle Z. Grainger, Jr., and the balance of $20,000.00 has been deposited into this escrow."

(4) In the event that this escrow fails to close due to any default or inability of the seller to deliver a good and marketable title or any other default on the part of the seller, then seller's sole responsibility to buyer shall be the return of buyer's deposit of $27,500.00 without offsets or costs, and seller agrees to pay all escrow and title charges incurred.

APPENDIX B.

March 23, 1967

2340/7

John N. Frolich, Esq.
727 West Seventh Street
Los Angeles, California

Re: Human Relations Research Foundation
(University of America Foundation)

Dear Mr. Frolich:

As you know, I met with the attorneys for Charter Auto Parks this morning to discuss the relinquishment of possession of the 929 South Hope Street parking lot. Irving Sulmeyer could not attend the meeting, and Robert Alberts, of his office, sat in on the meeting together with Wolk and Karno. Their position was apparently adamant with respect to voluntarily relinquishing possession. They insisted, among other things, that the Reorganization Estate was in no position to complain about the lease of January, 1966 with University of America because the Trustee had joined in obtaining an Order for application of the rental proceeds to the Scottish Rite Foundation and that this act amounted to an acceptance of the lease. It appears to me at this moment that there will be no voluntary surrender of the premises and that Charter is going to rely upon the lease of January 20, 1966 which was executed by Charles Simmons II as President of University of America Foundation and against which Simmons received $2,200 as payment for the 35th and 36th months of the term. Unfortunately, there was no provision in the lease for cancellation upon sale of the property.

Under the existing circumstances and in view of the apparent intent of Charter Auto Parks to litigate the matter, the Trustee now advises you on behalf of the buyers (George Ullman and Joe Simon) that it appears unlikely that possession of the parking lot can be delivered within a reasonable period of time and, accordingly, it now appears that the Trustee will be required to refund the deposit of $27,500. Please advise me on or before 5:00 p.m., March 30, 1967, whether the buyers will accept the property subject to whatever rights have been created in Charter Auto Parks or their successors by reason of the lease of January 20, 1966.

It is particularly unfortunate that the reorganization estate has been placed in this position in view of my letter of December 18, 1964 to Charles Simmons II, a copy of which is enclosed herewith.

Very truly yours,

ARNOLD M. QUITTNER

AMQ:pj
Enclosure

cc: Honorable James E. Moriarty (w/encl.)
Kyle Z. Grainger, Jr., Esq. (w/encl.)